Supreme Court, U.S.
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No. 86-1221

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

WILLIAM J. HARNETT,
Petitioner,

v.

TOM J. BILLMAN,
CLAYTON C. MCCUISTION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONER'S REPLY TO RESPONDENTS' OPPOSITION

JAMES D. CRAWFORD
THOMAS EARL PATTON*
BRETT L. ANTONIDES
AMY R. DOBERMAN

Attorneys for Petitioner

Of Counsel
SCHNADER, HARRISON, SEGAL & LEWIS
1111 19th Street, N.W.
Suite 1000
Washington, D.C. 20036
(202) 463-2900

* *Attorney of Record*

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PETITIONER'S REPLY

Despite respondents' contrary contention, this case squarely presents the issue of whether *Erie R.R. Co. v. Tompkins,* 304 U.S. 64 (1938), requires state preclusion law to govern the effect of a judgment in a prior federal diversity action on a subsequent diversity action between the same parties.

Respondents' opposition is founded entirely upon their assertion that petitioner's original EPIC action involved the dismissal of federal question claims. They argue that, in turn, the *res judicata* effect of the dismissal of federal question

claims—as opposed to diversity claims—should be determined by federal law. However, the order dismissing Mr. Harnett's first action dealt only with common law diversity claims. Thus it is respondents, not petitioner, who have distorted the record by characterizing the dismissal order in *Harnett I* as one involving federal question claims.

When petitioner Harnett's original EPIC action was settled and dismissed, the action was one arising solely out of common law claims and jurisdiction was based solely on diversity of citizenship of the parties. The only two counts remaining at that time were for common law fraud and for derivative harms to the corporation in the form of breach of fiduciary duty. (A34). Although Mr. Harnett's complaint in the EPIC action originally contained additional claims asserted under the district court's federal question jurisdiction and arising under federal statutes, those claims had been dismissed earlier in the case.

In *Harnett I,* the complaint expressly invoked the diversity jurisdiction of the district court under 28 U.S.C. § 1332. That action, brought by a Pennsylvania resident, against respondents and other parties, none of whom were Pennsylvania residents, originally included claims for common law fraud (Count I), declaratory judgment (Count II), RICO (Count III), federal securities laws violations (Count IV) and a shareholders' derivative action (Count V). On December 23, 1983, the district court dismissed Counts II, III and IV. (See District Court Order, December 23, 1983, attached hereto as Exhibit A). After this order, only the common law fraud claim and the shareholders' derivative action remained. Accordingly, the February 16, 1984 dismissal was that of a diversity action. (A34). It is the preclusive effect of that order, and only that order, that is in issue.

The present action, likewise, is solely a "common law fraud action," as the district court stated (A16), and the district court's judgment was solely for damages for common law fraud.

The Fourth Circuit recognized *Harnett I* as a federal diversity action. The court stated, "we conclude that whether a

federal court sits in diversity or has some other basis of jurisdiction, questions of the effect and scope of its judgment involve the power of the federal tribunal itself, and are not varied merely because state rules of decision underlie the judgment." (A7-8). Furthermore, obviously discussing the case at hand, the court, in a footnote, acknowledged that "in many cases, the issue of whether state or federal law governs a *res judicata* question arising out of a prior judgment entered by a *federal court sitting in diversity* is irrelevant, for often the state and federal rules on judgment will coincide." (A7, n.1) (emphasis added). The entire thrust of the Court of Appeals' opinion turns on the application of federal *res judicata* principles to the earlier federal diversity action.

In summary, the district court's jurisdiction over state law claims was not "pendent" to federal claims, as respondents maintain. All the federal claims were disposed of well before final disposition of the state claims, leaving an action based entirely on diversity jurisdiction. Accordingly, the issue presented by petitioner was properly framed, namely, the source of *res judicata* principles applicable in successive diversity actions. It is an important issue, because over 60,000 diversity cases are pending in district courts. Reports of the Judicial Conference, Report of the Administrative Office, U.S. Courts—1985, Table C2.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that his petition for a writ of certiorari be granted.

JAMES D. CRAWFORD
THOMAS EARL PATTON*
BRETT L. ANTONIDES
AMY R. DOBERMAN

Attorneys for Petitioner
William J. Harnett

Of Counsel
SCHNADER, HARRISON, SEGAL & LEWIS
1111 19th Street, N.W.
Suite 1000
Washington, D.C. 20036
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* *Attorney of Record*

EXHIBIT A

In The
UNITED STATES DISTRICT COURT
For The Eastern District of Virginia
Alexandria Division

Civil Action No. 83-1029-A

WILLIAM J. HARNETT,
Plaintiff,

v.

TOM J. BILLMAN, *et al.*,
Defendants.

ORDER

For the reasons stated from the bench, it is hereby ORDERED that:

1. The motion of the defendants to dismiss Counts II, III and IV of the Amended Complaint is granted.

2. The motion of the defendants to dismiss Count I of the Amended Complaint is denied, provided that the relief to which the plaintiff is entitled under Count I is limited to those damages arising from the alleged fraudulent prevention of the plaintiff from exercising his appraisal rights plus any punitive damages if an entitlement thereto is proved at trial. It is noted with regard to Count I that the defendants concede that they do not object to the plaintiff's exercise of those appraisal rights even at this time.

3. The motion of the defendants to dismiss Count V is denied.

/s/
United States District Judge

Alexandria, Virginia
December 23rd, 1983